

REMARKS

Without acquiescing to the propriety of the rejections in the Office Action dated December 31, 2003, claims 1, 24, 28, 34 and 40 have been amended. Entry of these amendments, reconsideration of the application, and allowance of all claims pending herein is respectfully requested in view of the remarks below, and the accompanying Request for Continued Examination. Claims 1-18, 21, 23-32, 34-36 and 40-41 are pending and under consideration.

Initially, Applicant notes that the present Office Action was made Final although it is a first Office Action in response to a Response filed with a Request for Continued Examination. Further, the Office Action alleges that the finality of the Office Action is proper because (1) all claims were drawn to the same invention claimed in the application prior to the entry of the Response filed with the Request for Continued Examination and (2) the claims could have been finally rejected on the grounds and the art of record in the next Office Action if they had been entered in the application prior to the entry of the Response filed with the Request for Continued Examination. Applicant respectfully submits that the finality of the present Office Action is improper at least due to (1) above. Specifically, the Response filed with the Request for Continued Examination dated November 17, 2003 included claim amendments which recited a body configured to be attached to the hydrotherapy-tub stationary relative to a wall of the tub. Such recitation was not present in the claims pending prior to the November 17, 2003 Response. Therefore, the claims filed with the November 17, 2003 Response were not drawn to the same invention claimed in the application prior to such Response. Because the invention was not the same before and after such amendment, it is respectfully submitted that the finality of the present Office Action is improper. MPEP § 706.07(b). Thus, Applicant respectfully requests that the finality of the Office Action dated December 31, 2003 be withdrawn and that the RCE fee included herewith be refunded to Applicant.

Election of Invention:

Applicant hereby affirms the election of Species I, claims 1-18, 21, 23-32, 34-36, 40 and 41, which was made in a telephone conversation with the Examiner on December 22, 2003.

§ 102 Rejections:

Claims 1-6, 10, 16-18, 21, 23-32, 34-36, 40 and 41 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Martin (U.S. Patent No. 1,982,260). The Office Action alleges that Martin discloses a body having a water inlet and an air inlet, means for providing a plurality of jets, a water chamber, an air chamber and a hydrotherapy tub. Further, the Office Action alleges that a frame 97 of the device in Martin is a body portion which is stationary even during operation. Further, the Office Action acknowledges that the injector unit in Martin is movable.

Claim 1 of the present application recites a fluid flow system for a hydrotherapy tub which includes a body and a plurality of outlets. The body is configured to be attached to a hydrotherapy tub having an opening through a wall of the tub such that the body is immovable relative to the wall during operation. The body further includes a first chamber and a second chamber. The first chamber is configured to receive water through the opening in the wall and the second chamber is configured to receive air through the opening in the wall. The plurality of outlets is in fluid communication with the first chamber and the second chamber, and the outlets are configured to transmit water from the first chamber and air from the second chamber to an interior of the hydrotherapy tub.

Martin discloses an apparatus for insertion into a bathtub which is placed on an interior surface of the tub and receives fluid through conduits which pass through an interior fluid containing portion of the bathtub. Specifically, a water conduit appears to run to a water faucet mounted on an interior surface of the tub while an air conduit appears to exit the tub to allow ambient air to be passed therethrough. Also, Martin discloses an injector unit which is mounted

for reciprocation in frame 97 (alleged to be a body in the Office Action). During movement of the injector unit, liquid is supplied to the nozzles as the nozzles travel along elongated slots, as described on page 2, lines 75-78 and 103-107, for example. Also, during movement of the injector unit, a massage may be caused to progress up and down the arm of a patient to stimulate circulation thereof, as described on page 2, lines 115-120. As noted previously by the Examiner, the device disclosed in Martin may also be embodied in permanent installations in hospitals and alike, but there is no indication in Martin that such permanent installation would alleviate the need for movement of the injector unit to provide a massage to a patient. Further, there is no disclosure in Martin of a body having a plurality of outlets wherein the body is immovable relative to a wall of a hydrotherapy-tub during operation, as recited in claim 1 of the present application. Instead, as noted, the injector unit disclosed in Martin is movable to allow a massage to be provided to a patient and further must be movable to allow the injector unit to discharge water to the interior of the tub as described on page 2, lines 80-83.

Moreover, even if frame 97 is considered to be a body, as alleged in the Office Action, such body does not include a plurality of outlets which are configured to transmit water to an interior of a tub. Instead, the plurality of jets 102 and 103 are slidably mounted on guide rods 104 and the jets move relative to frame 97, as described on page 4 of Martin. Thus, Martin does not disclose a body which is immovable relative to a hydrotherapy tub during operation and which includes a plurality of outlets configured to transmit water to an interior of a tub.

Therefore, because the features of claim 1 of the present application (e.g., a body having outlets, which is immovable relative to a tub wall during operation) are not identically disclosed in Martin, claim 1 cannot be anticipated thereby. The claims depending from claim 1 are believed to be allowable for these reasons and for their own additional features. Claim 24 recites a hydrotherapy tub which incorporates the elements of claim 1. Thus, claim 24 is believed to be allowable for these reasons as are the claims depending from claim 24.

Claim 28 recites, *inter alia*, a body configured to be mounted to a hydrotherapy tub having an opening through a wall of the tub such that the body is immovable relative to the wall

during operation. A water and an air inlet are configured to receive water and air, respectively, through the opening in the wall. Further included is means for providing a plurality of jets of water-air froth to an interior of the tub. As described above, Martin does not disclose a body configured to be mounted to a hydrotherapy tub such that the body is immovable relative to a wall of the tub during operation. Therefore, because the elements of claim 28 are not identically disclosed by Martin, it is respectfully submitted that this claim is allowable along with the claims depending therefrom. Claims 34 and 40 are believed to be allowable for the same reasons. Claims 35, 36, and 41 are believed to be allowable for the same reasons as their base independent claims and for their own additional features.

Also, the Office Action alleges on the bottom of page 3 and top of page 4 that Applicant has acknowledged that the phrase “configured to be attached” is met by the structure of Martin. Applicants respectfully disagrees with this assertion. As described in the previous responses and the present response, it is respectfully submitted that the Martin device does not disclose a body configured to be attached to a hydrotherapy tub through a wall of the tub such that the body is immovable relative to the wall.

§ 103 Rejections:

Claims 1-10, 16-18, 21, 23-32, 34-36, 40 and 41 stand rejected under 35 U.S.C. § 103(a) as being obvious over Martin in view of Gardenier et al. (U.S. Patent No. 6,182,203). Specifically, it is alleged that Gardenier et al. discloses an opening through a tub wall and it would be obvious to associate an opening with the Martin tub wall in order to provide a more permanent system, as contemplated in pages 4 and 5 of Martin.

Pages 4 and 5 of Martin disclose that a bathtub may be embodied in permanent installations in hospitals and the like. It is respectfully submitted that the possibility of incorporating the Martin device into a permanent installation would not provide the motivation to combine Martin with Gardenier et al., nor a suggestion or motivation to provide a body having outlets, which is immovable relative to a wall of the hydrotherapy-tub during operation. In fact, it

is respectfully submitted that it is only through impermissible hindsight reasoning that Gardenier et al. and Martin have been combined to allegedly make the claims obvious.

The cited language relating to making a device permanent does not provide any suggestion or motivation to mount the device through a wall of the tub nor a suggestion to mount it stationary relative to a wall of the tub such that it is immovable during operation. In fact, page 1, column 1 of Martin discloses that it is desirable that the device is movable such that a massage may be caused to progress from one part of the body to another. Further, column 1 discloses that it is undesirable for any region of application of a massage to be fixed, since it is then necessary to adjust the apparatus or move the patient to massage other portions of the body. It is also stated that the object of the invention in Martin is to movably apply a massage to the body whereby a region of application of the massage is caused to progress from one part of the body to another.

When such description is combined with the suggestion to embody the device in permanent installations in hospitals and the like, it appears that the permanence of such an installation may relate to the type of materials used, permanent connection of the conduit to the water faucet, or other unknown advantages, but it would not relate to mounting such a device to a wall of a tub such that it would be immovable relative thereto during operation, since this would be in contrast to the goal of the movability of such a device relative to various portions of a user's body. Specifically, if the device in Martin was mounted to a spa wall as in Gardenier et al., i.e., such that it was immovable during operation, it would not achieve the stated objective of providing a movable massage (i.e., because it would be immobile), and would thus be unsatisfactory for its intended purpose. Further, as described on page 2, lines 103-120, for example, the movement of the injector unit causes the discharge of the fluid therethrough, and thus if the injector unit was made immovable relative to a wall of a hydrotherapy-tub, the injector unit would not function as intended to discharge such water. Moreover, even if frame 97 was immovable relative to the wall as the Office Action appears to allege, jets 102 and 103 must be movable to allow the movable massage described in column 1 of Martin. Thus, frame 97 in Martin cannot be a body which is immovable and which includes a plurality of outlets configured

to transmit water to an interior of a spa, as is recited in claim 1, because the alleged outlets in Martin, i.e., jets 102 and 103, are movable during operation.

Therefore, it is respectfully submitted that there is no suggestion or motivation which would cause one skilled in the art to combine the Martin and Gardenier et al. references. Further, even if these references were combined as alleged, such combination would make the Martin device unsatisfactory for its intended purpose, i.e., the outlets thereof would be immobile and would not function to provide a movable massage or to expel water therefrom. Moreover, such combination would not result in outlets which are part of an immovable body. Accordingly, these references cannot make the claims of the present application obvious and this rejection is believed to be overcome.

Claims 11-15 stand rejected under 35 U.S.C. § 103(a) as being obvious over Martin and Guiler. Guiler is alleged to disclose conical structures which would be obvious to incorporate into the Martin device to arrive at the subject matter of the referenced claims. As noted previously, because these rejections rely on the §102 application to Martin, these claims are believed to be allowable for the same reasons as claim 1 along with the additional features of the conical structures. Therefore, these claims are believed to be allowable. The Office Action has also alleged that applicants have acquiesced in this ground of rejection. Applicant respectfully traverses this assertion. Applicant has consistently stated that these claims are believed to be allowable for the same reasons as their base independent claims and for their own additional features. Because Applicant has asserted that the base independent claims are allowable, there is no reason to further argue the merits of the dependent claims themselves, nor the merits of the cited reference. No acquiescence regarding these grounds of the rejection is intended.

CONCLUSION

It is believed that the application is in condition for allowance, and such action is respectfully requested.

Applicant respectfully requests that the finality of the Office Action dated December 31, 2003 be withdrawn and that the RCE fee included herewith be refunded to Applicant.

If a telephone conference would be of assistance in advancing prosecution of the subject application, Applicant's undersigned attorney invites the Examiner to telephone him at the number provided.

Respectfully submitted,

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